

Mississippi Appellate Court Upholds Standing of Excess Insurer To Sue Defense Counsel

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Great American E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A., ___ So.3d ___, 2012 WL 266858 (Miss. 2012)

Brief Summary

In a case of first impression in Mississippi, an appellate court held that an excess insurer has standing to sue defense counsel retained to defend the insured.

Complete Summary

This case considered whether the trial court properly dismissed the claims made by an excess insurer against the law firm retained to defend the insured. The appellate court concluded an excess insurer has standing to sue defense counsel, and the trial court was thus reversed.

The insured, a nursing home, purchased a primary policy from a primary insurer with limits of \$1,000,000 per occurrence and \$3,000,000 in the aggregate. It also purchased an excess policy from an excess insurer with limits of \$8,000,000 per occurrence and \$16,000,000 in the aggregate. After the insured was sued for nursing home malpractice, the primary insurer hired defense counsel. The excess insurer was notified of the lawsuit, but it did not have a duty to defend until the primary policy limits were exhausted. The excess insurer was to be informed of the status of the case.

The excess insurer requested assessments of the claim from defense counsel. Defense counsel provided the excess insurer with status reports. The status reports opined that the settlement value of the case was between \$150,000 and \$400,000, based on the initial evaluation of the medical records. The reports also stated that experts needed to be designated, but no experts had been retained. The case was then transferred to new defense counsel. At that time, there was an order in place that set the deadline for the disclosure of defendant's experts on

December 15, 2003. Around this time, the insured expressed to the primary insurer its concern that none of the partners or trial attorneys at defense counsel's firm were licensed to practice law in Mississippi.

Ultimately, the trial court barred the insured from calling experts at trial. The next day, defense counsel sent an "updated" evaluation and increased the settlement value of the case to a range of \$3,000,000 to \$4,000,000. This was the first indication the excess insurer received that its excess policy may be implicated, and it immediately retained counsel. Shortly thereafter, the primary insurer tendered the limits of its policy. The excess insurer then settled the lawsuit for a significant sum, which was not disclosed. There were three other cases where the primary insurer retained defense counsel to defend the insured (the nursing home), and the excess insurer alleged that it was damaged by defense counsel's mishandling of each of these cases.

The excess insurer then filed claims against defense counsel for equitable subrogation, legal malpractice, negligence, gross negligence, negligent misrepresentation, and negligent supervision. Defense counsel filed a motion to dismiss on the basis that the excess insurer lacked standing to file suit because there was no attorney-client relationship between the excess insurer and defense counsel. The trial court granted the motion and dismissed the claims.

The appellate court reversed and remanded. In summary, the court held that if, as alleged, the excess insurer was provided defense counsel's evaluation of the "settlement value" of the lawsuit, that transmittal of such information could be the rendition of professional legal services by a lawyer. The court believed that a communication of the "settlement value" could be considered a "confidential communication" because it was "intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Thus, the communication could not be considered "privileged" unless the excess insurer was a "client" or a "representative of the client." The court also held that because of the relationship among the insured, the primary insurer, defense counsel and the excess insurer, privity of contract was not required to support the claims against defense counsel. Finally, the court concluded that the action could proceed based on equitable subrogation.

Significance of Opinion

This decision is noteworthy because Mississippi joins a small minority of state courts which have allowed an excess insurer to sue defense counsel. If followed, it would have a huge impact in litigation and create significant concerns for defense counsel.

For further information, please contact [Terrence P. McAvoy](#).

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